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IN THE

SUPREME COURT OF THE UNITED STATES

JULY TERM, 1974

No. 73-2049

HERBERT F. STRAUB, JAKE H. EHRET, and KENNETH RUSTAD, as County Commissioners for Fallon County, Montana, and SILVER ROTH, as County Treasurer of Fallon County, Montana,

Petitioners,

-vs-

ROBERT L. WOODAHL, Attorney General of the State of Montana, and the MONTANA DEPARTMENT OF REVENUE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE STATE OF MONTANA

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Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF MONTANA

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Montana entered in the above-entitled case on February 6, 1974.

In addition to the parties named in the caption, others appeared in the case by intervention. They are identified as follows:

(a) Intervenors whose position was in support of petitioners:

Powder River County, Montana, by answer through Robert J. Brooks, County Attorney.

Pete Hill, Albert Pikkula, John H. Mellor, Ross Denson, Clifford Green, Merle Fletcher, Voyle Samuelson, Carl Schaffer, and all other persons similarly situated as taxpayers, residents and voters of Powder River County, Montana.

(b) Intervenor whose position may be considered adverse to that of petitioners:

Dolores Colburg, Superintendent of Public Instruction of the State of Montana.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of Montana, printed in Appendix C hereto, is reported in 520 P.2d 776.

JURISDICTION

The judgment of the Supreme Court of Montana was entered on February 6, 1974, and is contained in the aforementioned opinion. A motion for rehearing, timely filed, was denied by order entered on April 24, 1974, printed in Appendix D hereto. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3).

QUESTIONS PRESENTED

1. Whether the Montana Supreme Court has denied to the petitioners due process of law in entering a judgment on the merits, making disposition of substantial tax receipts, without affording to the petitioners a hearing on the factual issues raised by the pleadings and acknowledged by the court.

2. Whether Chapter 355 of the Laws of Montana, 1973, which among other things imposes limitations on budget increases for public schools, requires counties to impose certain minimum rates of taxes for school purposes, and further requires them to remit any excess in the proceeds over the budget requirements to the state for distribution to schools in other counties, denies to the petitioners equal protection of the laws, deprives them of property without due process of law,

or constitutes a taking of their property without just compensation, in violation of the Fourteenth Amendment to the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Section 1 of the Fourteenth Amendment to the United States Constitution, reading as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The statutory provisions involved are those enacted as Chapter 355 of the Session Laws of Montana, 1973, since codified as Sections 35-6912, 75-6913, 75-6916, 75-6921, 75-6922, and 75-6923 of the Revised Codes of Montana, 1947. Chapter 355 is printed in Appendix A hereto.

STATEMENT

This case involves the constitutionality of Chapter 355, enacted by the 1973 Montana legislative assembly, effective July 1, 1973, and concerning the budgeting and funding of the state's elementary and high school systems. It also involves the constitutionality of action by the Supreme Court of Montana, in rendering final judgment with respect to the disposition of tax monies collected by the Treasurer of Fallon County, Montana, without an evidentiary hearing, where disputed facts were admittedly present and placed in issue by the pleadings.

Chapter 355 introduced into the state's school foundation program of budgeting an entirely new concept, namely, the requirement that all counties impose basic taxes at a forty mill minimum rate, and that all school districts impose additional "permissive" taxes at an annually determined minimum rate, regardless of budget requirements in the district or county. In addition, the budgets of all schools were partially frozen by the inclusion of an annual limitation of increase of seven per cent of the previous year's budget for each district.

The result of this legislation for the fiscal year commencing July 1, 1973, was that Fallon County taxpayers paid basic county taxes at the rate of forty mills, whereas only thirty mills were required to finance its schools at the budgets set by law, and paid an additional twelve mills in permissive levies, virtually all of which were unavailable for the support of the schools in the county. An excess of approximately $450,000 was thus produced in tax revenues in Fallon County, which was unavailable for local school financing because of the budget increase limitations also imposed by Chapter 355. The same law purported to require the county to remit that excess to the State Treasurer for distribution to school districts outside of Fallon County, whose budgets were not completely financed by local taxation and state equalization aid.

The County Commissioners of Fallon County, deeming Chapter 355 to be in violation of state and federal constitutional provisions, directed the County Treasurer to retain the excess pending a final determination as to the validity of the law. A case had already been filed in the District Court of Powder River County, and it was expected that the matter would finally be determined in that proceeding.[1] Thereafter, on December 7, 1973, the respondents filed an original declaratory judgment proceeding in the Montana Supreme Court, requesting

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[1]Hill, et al. v. Cook, et al., District Court of the Sixteenth Judicial District of the State of Montana, in and for the County of Powder River, Cause No. 1391.

that the law be upheld and that petitioners be required to release the fund to the state for distribution to schools outside of Fallon County. In their complaint, the respondents alleged that no material factual controversies existed, and that only legal questions were presented.

By their answer the petitioners placed in issue the allegation that no material factual controversies existed, asserted that the facts would demonstrate the invalidity of Chapter 355, and requested the court to remand the case to a lower court for a resolution of the factual issues. The answer also presented petitioners' contentions that Chapter 355 was in violation of the due process clauses of the Montana and federal constitutions, both on its face and in its application to the facts of the case. These contentions were maintained and argued through all phases of the proceedings.

Hill, Pikkula, et al., intervened as citizens and taxpayers of Powder River County, contending that the identical issues were the subject of a civil action filed by them in the District Court of Powder River County (see footnote 1) and that it was necessary to have the factual issues resolved in a trial on the merits. They moved to dismiss this action on these grounds. Powder River County also intervened and advanced similar contentions.

The county attorney of Treasure County appeared amicus curiae at the time of oral argument, contending that the act was unconstitutional, both on its face and as applied to the school systems and taxpayers of his county.

The county attorney of Meagher County appeared amicus curiae, advancing contentions which are not involved in this petition. The State Superintendent of Public Instruction also appeared, but confined her brief and argument to the issues presented by Meagher County.

Thus, on one side of the arguments concerned in this petition were the relators below, and on the other side were Fallon, Powder River and Treasure Counties, and the named citizens

and taxpayers of Powder River County, for themselves and others similarly situated.

On February 6, 1974, the Supreme Court of Montana entered judgment requiring the respondent to remit forthwith the funds in dispute, approximately $450,000, and declaring that Chapter 355 was constitutional "on its face." In response to the arguments of petitioners and intervenors, that there were factual issues which must be determined, the court stated in its opinion:

> "Without the facts of a specific situation before us, we can only consider the constitutionality of the foundation program and budget limitations of Chapter 355 on their face and not as applied."

Later in the opinion the court stated:

> "Because of the view we have taken of the other issues in the case, it is clear that the factual questions alluded to in the final issue raised by respondents while real, are not relevant. We will not consider that issue further."

The judgment was entered by the following language in the opinion:

> "This opinion constitutes a judgment that Chapter 355 is constitutionally valid on its face. Therefore, defendant Silver Roth, County Treasurer of Fallon County, is ordered to remit forthwith to the state those monies collected under authority of Chapter 355."

Respondents promptly moved the court for a stay, first, to afford them an opportunity to pursue action in a lower court for resolution of the factual issues, and in the alternative, to afford them an opportunity to seek review of the judgment by the United States Supreme Court. On February 13, 1974, the stay was denied, by an order which gave no recognition to the

possibility of further action in a lower court, but alluded only to petitioners' announced intention to prosecute proceedings for review. It was stated that the funds could be returned if so ordered by further proceedings, and therefore an involuntary payment would not render the issues moot. Promptly thereafter the funds were turned over to the state treasurer in accordance with the judgment.

Petitioners timely filed a petition for rehearing, contending that the court had not afforded them an opportunity to present evidence on the factual issues which were presented by the record and acknowledged by the court, and that such action was a procedural violation of the due process clause. The petition was denied by order of the court dated April 24, 1974.

Since the procedural due process question arose upon the entry of the judgment, there was no opportunity for the petitioners to raise the question until the petition for rehearing. It was asserted at that stage of the proceeding.

REASONS FOR GRANTING THE WRIT

This case involves action by the highest court of a state which challenges the fundamental principle of our judicial system, namely, the right to a fair trial. In a case involving disputed facts, raised by the petitioners and recognized by the court, final judgment was entered, disposing of approximately $450,000 of Fallon County school tax funds and over $3,000,000 of such funds of thirty-eight other counties in the state. These funds had been withheld by the various counties in the belief that Chapter 355 was contrary to the state and federal constitutions, both as a matter of law and as applied to the factual circumstances. Petitioners and the intervening counties insisted at every stage of the proceedings on their right to a trial upon the factual issues, but were refused by the court in an opinion which acknowledged the existence of disputed facts.

Consequently, unless the cause is accepted by this Court for review, the Supreme Court of Montana will have effectively

and finally denied recourse to the petitioners, in an extraordinary original proceeding which has deprived them of the basic right of fair trial, a right guaranteed to all citizens under the Fourteenth Amendment.

The importance of preserving the right to a hearing cannot be questioned. It has been stressed in many recent Supreme Court decisions, including *Fuentes v. Shevin*, 407 U.S. 67; *Bell v. Burson*, 402 U.S. 535; and *Armstrong v. Manzo*, 380 U.S. 545. When a state supreme court by its own action denies due process, it seems to us essential that review be considered, for the purpose of maintaining the principles which constitute the backbone of our judicial system.

A strikingly similar situation was presented in *Saunders v. Shaw*, 244 U.S. 317. The plaintiff in that case brought action to enjoin the collection of a drainage tax, on the ground that his property would receive no benefit from the system. The Supreme Court of Louisiana initially affirmed a judgment for the defendant, but thereafter granted a rehearing and reversed its position. The effect of this was to deny to the defendant an opportunity to introduce evidence in support of his position. The United States Supreme Court, in an opinion by Mr. Justice Holmes, held that this action by the appellate court constituted a denial of due process of law contrary to the Fourteenth Amendment.

In the *Saunders* case it was contended that the defendant had not preserved his constitutional grounds of review in an appropriate pleading to the appellate court. The Supreme Court disposed of this contention by stating in the opinion:

> "The record discloses the facts but does not disclose the claim of right under the Fourteenth Amendment until the assignment of errors filed the day before the Chief Justice of the State granted this writ. Of course ordinarily that would not be enough. But when the act complained of is the act of the Supreme Court, done

> unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here."

In our view the Montana court has precluded further action for the recovery of these funds. This was demonstrated by its order denying stay of the judgment, where only our right to seek appellate review was recognized. It is further demonstrated by the fact that no independent remedy now exists by which the petitioners or anyone else could seek such a recovery. The funds had been held by petitioners as trustees for the citizens and taxpayers of Fallon County, and their duty to remit them could appropriately be resolved in this case, after a trial on the merits. But we are unable to conceive how petitioners or the citizens of Fallon County could proceed in an independent action for the resolution of these issues, especially where the right to the funds has been adjudged by the highest court of the state. In short, the remedy was available but it has been eliminated by the court unless its action is reversed in this proceeding.

It may be suggested that petitioners, in their capacity as county officers, have not been personally aggrieved by the action complained of, and thus are in no position to insist on due process. But they are trustees of the funds for the use and benefit of Fallon County citizens, who certainly are entitled to constitutional protection. In *Carbon County v. Draper*, 84 Mont. 413, 276 P. 667, the Montana Supreme Court said:

> "Public moneys are but trust funds, and officers but trustees for their administration in the manner, and for the purposes, prescribed by statute."

In fiscal year 1973-1974 Chapter 355 required the imposition of county levies of approximately ten mills against the residents of Fallon County, and the further imposition of statewide

levies of approximately twelve mills against the residents of Fallon County, the proceeds of which were to be remitted to the state equalization fund for distribution to school districts outside of Fallon County. The schools in Fallon County receive no benefit whatever from the monies so remitted. Similarly, Chapter 355 required the imposition of taxes in thirty-nine counties of the state of Montana, for distribution to the other seventeen counties of the state. We contend that this is a gross abuse of the taxing power, which discriminates against the thirty-nine counties and their taxpayers, and which deprives them of their property without due process of law or just compensation. We quote from *Cooley on Taxation*, 4th Ed., Vol. 1, Sec. 186:

> "Purpose as pertaining to district taxed. The purpose of a tax must not only be public but must pertain to the district taxed. It follows that one district cannot be taxed for the benefit of another district. So property outside the territorial limits of the taxing district cannot be taxed but a tax may be for the use of the district taxed although its proceeds are to be expended outside the district."

In *State ex rel. Davis v. Stuart*, 97 Fla. 69, 120 Sou. 335, the court said:

> "When the legislature exercises the power to subject the property of the citizens to taxation, there are two questions which may generally be raised: (1) whether the purpose of the burden imposed is a public purpose, and (2) if public, whether the burden is one which should properly be borne by the district upon which it is imposed. If either of these questions is answered in the negative, the legislature assumes an authority not conferred by the general grant of legislative power, and offends against those provisions of the declaration of rights which pro-

> tect private property from arbitrary invasion without just compensation."

The power of a state to tax is subject to the limitations of the Fourteenth Amendment. We quote from *Ohio Oil Company v. Conway*, 281 U.S. 146:

> "The states in the exercise of their taxing power are subject to the requirements of the due process and the equal protection clauses of the Fourteenth Amendment."

If petitioners are permitted to do so, they will introduce evidence to show that Chapter 355 provides for inequitable distribution of funds in violation of the state and federal constitutions; that school systems in Fallon County have budgeted to the maximums permitted by law; that the "permissive" levies which they are required under Chapter 355 to remit to the state treasurer are needed for the support of their own school systems and would be so utilized if they were not precluded from doing so under the seven per cent provision in Chapter 355; and that the law makes it impossible for Fallon County to provide for its school children a basic system of education comparable in quality to the school systems in other counties which are recipients of Fallon County tax funds. In our view the Montana court has recognized the existence of these factual issues, but has denied to the petitioners the opportunity to present evidence in support of their contentions.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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DENZIL R. YOUNG
Baker, Montana 59313

By: */s/ A. W. Scribner*

Counsel for Petitioners

AFFIDAVIT OF SERVICE

State of Montana)
County of Lewis & Clark) ss.

I, A. W. Scribner, attorney for the petitioners herein, depose and say that on the _____ day of July, 1974, I served copies of the foregoing Petition for Writ of Certiorari upon all parties as follows:

by mailing one copy to:

Robert L. Woodahl
Attorney General of Montana
State Capitol Building
Helena, Montana 59601

by mailing one copy to:

R. Bruce McGinnis
Tax Counsel
Department of Revenue
Sam W. Mitchell Building
Helena, Montana 59601

by mailing one copy to:

Carroll C. Blend, Attorney
Office of the Superintendent of Public Instruction
State Capitol Building
Helena, Montana 59601

by mailing one copy to:

Robert J. Brooks
County Attorney
Courthouse
Broadus, Montana 59317

by mailing 8 copies to:

Sandall, Moses, Cavan & Kampfe
2501 Fourth Avenue North
Billings, Montana 59101

by mailing one copy to:

Ralph L. Herriott
County Attorney
Courthouse
Hysham, Montana 59038

and by mailing one copy to:

Richard J. Conklin
County Attorney
Courthouse
White Sulphur Springs, Montana 59645

by placing the same in envelopes addressed as above, with proper first class postage attached, and depositing them in the United States mails at Helena, Montana, on said date.

/s/ A. W. Scribner

Subscribed and sworn to before me the _____ day of July, 1974.

/s/ Deena G. Holloway
Notary Public for the state of Montana.
Residing at Helena, Montana.
My Commission expires 11-17-75.

APPENDIX

APPENDIX A

UNITED STATES OF AMERICA)
State of Montana) ss.

I, FRANK MURRAY, Secretary of State of the State of Montana, do hereby certify that the following is a true and correct copy of House Bill No. 428, Chapter No. 355, Montana Session Laws of 1973, enacted by the Forty-third Session of the Legislative Assembly of the State of Montana, approved by Thomas L. Judge, Governor of said State, on the seventeenth day of March, and effective on the first day of July, 1973.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Great Seal of said State.

Done at the City of Helena, the Capital of said State, this seventeenth day of March 1973.

/s/ Frank Murray
FRANK MURRAY
Secretary of State

.....

CHAPTER NO. 355
MONTANA SESSION LAWS 1973
HOUSE BILL NO. 428

AN ACT REQUIRING COUNTIES TO LEVY THE SAME BASIC TAX FOR FOUNDATION PROGRAM SUPPORT AND TO DEPOSIT SURPLUS FUNDS IN THE STATE EQUALIZATION AID ACCOUNT; PROVIDING AN INCREASED LEVEL OF STATE PARTICIPATION IN THE DEFICIENCY AND PERMISSIVE LEVIES FUNDING THE MAXIMUM-BUDGET- WITHOUT-A-VOTE OF ELEMENTARY AND SECONDARY SCHOOL DISTRICTS; PROVIDING A LIMITATION ON SCHOOL DISTRICT BUDGET INCREASES; AND AMENDING SECTIONS 75-6912,

75-6913, 75-6916, 75-6921, 75-6922, AND 75-6923, R.C.M. 1947.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF THE STATE OF MONTANA:

Section 1. Section 75-6912, R.C.M. 1947, is amended to read as follows:

"75-6912. Basic county tax and other revenues for county equalization of the elementary district foundation program. It shall be the duty of the county commissioners of each county to levy an annual basic tax of twenty-five (25) mills on the dollars of the taxable value of all taxable property within the county for the purposes of local and state foundation program support. The revenue to be collected from this levy shall be apportioned to the support of the foundation programs of the elementary school districts in the county and to the earmarked revenue fund, state equalization aid account, in the following manner: In order to determine the amount of revenue raised by this levy which is retained by the county, the sum of the estimated revenues identified in subsections (1) through (6) below shall be subtracted from the sum of the county elementary transportation obligation and the total of the foundation programs of all elementary districts of the county. If the basic levy of twenty-five (25) mills produces more revenue than is required to finance the difference determined above, the county commissioners shall order the county treasurer to remit the surplus funds to the state treasurer for deposit to the earmarked revenue fund, state equalization aid account, not later than June 1 of the fiscal year for which the levy has been set.

The proceeds realized from the county's portion of the levy prescribed by this section and the revenues from the following sources shall be used for the equalization of the elementary district foundation programs of the county as prescribed in section 75-6914 and a separate accounting shall be kept of such proceeds and revenues by the county treasurer in accordance with subsection (1) of section 75-6805;

(1) the portion of the federal forest reserve funds distributed to a county and designated for the common school fund under the provisions of section 79-205, R.C.M. 1947;

(2) the portion of the federal Taylor Grazing Act funds distributed to a county and designated for the common school fund under the provisions of section 79-702, R.C.M., 1947;

(3) the portion of the federal flood control act funds distributed to a county and designated for expenditure for the benefit of the county common schools under the provisions of section 79-2102, R.C.M. 1947;

(4) all moneys which are paid into the county treasury as a result of fines for violations of law and the use of which is not otherwise specified by law;

(5) any money remaining at the end of the immediately preceding school fiscal year in the county treasurer's account for the various sources of revenue established or referred to in this section; and

(6) any federal or state moneys distributed to the county as payment in lieu of the property taxation established by the county levy required by this section."

Section 2. Section 75-6913, R.C.M. 1947, is amended to read as follows:

"75-6913. Basic special levy and other revenues for county equalization of high school district foundation program. It shall be the duty of the county commissioners of each county to levy an annual basic special tax for high schools of fifteen (15) mills on the dollar of the taxable value of all taxable property within the county for the purposes of local and state foundation program support. The revenue to be collected from this levy shall be apportioned to the support of the foundation programs of high school districts in the county and to the earmarked revenue fund, state equalization aid account, in the following manner: In order to determine the amount of revenue raised by this levy which

is retained by the county, the estimated revenues identified in subsections (1) and (2) below shall be subtracted from the sum of the county's high school tuition obligation and the total of the foundation programs of all high school districts of the county. If the basic levy for fifteen (15) mills produces more revenue than is required to finance the difference determined above, the county commissioners shall order the county treasurer to remit the surplus to the state treasurer for deposit to the earmarked revenue fund, state equalization aid account, not later than June 1 of the fiscal year for which the levy has been set.

The proceeds realized from the county's portion of the levy prescribed in this section and the revenues from the following sources shall be used for the equalization of the high school district foundation programs of the county as prescribed in section 75-6914, and a separate accounting shall be kept of these proceeds by the county treasurer in accordance with subsection (1) of section 75-6805:

(1) any money remaining at the end of the immediately preceding school fiscal year in the county treasurer's account for deposit of the proceeds from the levy established in this section; and

(2) any federal or state moneys distributed to the county as a payment in lieu of the property taxation established by the county levy required by this section."

Section 3. Section 75-6916, R.C.M. 1947, is amended to read as follows:

"75-6916. Definition of and revenue for state equalization aid. There shall be paid into the earmarked revenue fund, for state equalization aid to public schools of the state, twenty-five per cent (25%) of all moneys received from the collection of income taxes under chapter 49 of Title 84, R.C.M. 1947, and twenty-five per cent (25%) of all moneys received from the collection of corporation license taxes under chapter 15 of Title 84, R.C.M., 1947, as provided by section 84-1901, R.C.M., 1947. In

addition to these revenues, one-half (1/2) of the moneys received from the treasurer of the United States as the state's share of oil and gas royalties under the Act of Congress of February 25, 1920 shall be paid into the same earmarked revenue fund. In addition to these revenues, the surplus revenues collected by the counties for foundation program support according to sections 75-6912 and 75-6913 shall be paid into the same earmarked revenue fund.

As used in this Title, the term "state equalization aid" shall mean those moneys deposited in the earmarked revenue fund as required in this section plus any legislative appropriation of moneys from other sources for distribution to the public schools for the purpose of equalization of the foundation program."

Section 4. Section 75-6921, R.C.M. 1947, is amended to read as follows:

"75-6921. Additional state levy for state deficiency. If the estimated state equalization level made under the provisions of section 75-6920 is less than one hundred per cent (100%), it shall be the duty of the director of the department of revenue to levy, separately for the elementary districts and the high school districts, additional taxes in such number of mills on the taxable value of all taxable property within the state as shall be required to complete the financing of the foundation programs of all elementary districts or all high school districts of the state.

The state treasurer shall keep a separate accounting of the proceeds realized from these mill levies. The superintendent of public instruction shall apportion the proceeds of the mill levies to the elementary districts of the state or the high school districts of the state, whichever the case may be, on the following basis:

(1) Determine the total amount required from this source of revenue by the several elementary or high school districts of the state.

(2) Determine the total amount of moneys available for this source of revenue.

(3) Calculate the percentage the amount determined in subsection (2) is of the amounts determined separately in subsection (1) for all elementary or all high school districts.

(4) Multiply each elementary district or each high school district requirement for this source of revenue by the percentage calculated in subsection (3).

When the total amount of the proceeds realized from these mill levies is greater than the requirements of all the elementary districts or high school districts of the state, whichever the case may be, the excess amount of moneys shall be retained by the state for reduction of the ensuing year's additional state levy for elementary schools or high schools or, if there is no additional state levy under this section the excess may be transferred to the state equalization aid account for the reduction of the legislative appropriation.

The apportionment of state moneys under this section shall be known as the 'additional state levy for state deficiency' and it shall be the last source of revenue in calculating the financing of the elementary district foundation program and the high school district foundation program.

The superintendent of public instruction shall compute the budgeted requirement for this source of revenue for each district and shall supply the total state requirements for the elementary district foundation programs and the high school district foundation programs to the director of the department of revenue on the second Monday of August."

Section 5. Section 75-6922, R.C.M. 1947, is amended to read as follows:

"75-6922. Permissive levy. (1) Whenever the trustees of any district shall deem it necessary to adopt a general fund budget in excess of the foundation program amount but not in excess of the maximum general fund budget amount for such district as established by the schedule in section 75-6905, the trustees shall adopt a resolution stating the reasons and purposes for

exceeding the foundation program amount. The financing of such general fund budget amount shall be known as the 'permissive levy,' and it shall be financed by a levy on the taxable value of all taxable property within the district as prescribed in section 75-6926, supplemented with revenue from a levy on all the taxable property in the state.

(2) The district levies to be set for the purpose of funding the permissive amount are determined as follows:

(a) For each elementary school district, the county commissioners shall annually set a levy not exceeding nine (9) mills on all the taxable property in the district for the purpose of funding the permissive levy requirements of the district. If the amount of revenue raised by this levy is not sufficient to fully fund the district's permissive levy requirements, the amount of the deficiency shall be paid to the district from the earmarked revenue fund, permissive levy account, according to the provisions of subsection (3) of this section.

(b) For each high school district, the county commissioners shall annually set a levy not exceeding six (6) mills on all taxable property in the district for the purpose of funding the permissive levy requirements of the district. If the amount of revenue raised by this levy is not sufficient to fully fund the district's permissive levy requirements, the amount of the deficiency shall be paid to the district from the earmarked revenue fund, permissive levy account, according to the provisions of subsection (3) of this section.

(3) The director of the department of revenue shall annually set a levy on all the property of the state which will produce enough revenue to fund the permissive levy deficiency of the elementary and high school districts of the state. The proceeds of this levy shall be deposited to the earmarked revenue fund, permissive levy account, and shall be distributed to the elementary and high school districts in accordance with their entitlements as determined by the superintendent of public instruction according to the provisions of subsections (1) and (2) of this section.

Such distribution shall be made in two payments. The first payment shall be made at the same time as the first distribution of state equalization aid is made after January 1 of the fiscal year. The second payment shall be made at the same time as the last payment of state equalization aid is made for the fiscal year. If sufficient revenue is not collected to completely cover the permissive levy requirement of the districts, each district will receive the same percentage of its total requirement. Surplus revenue in the permissive levy account shall be used to reduce the state levy required for the next succeeding fiscal year. Interest earned on investment of permissive levy funds shall be deposited to the earmarked revenue fund, permissive levy account, for distribution during the next succeeding fiscal year."

Section 6. Section 75-6923, R.C.M. 1947, is amended to read as follows:

"75-6923. Additional levy for general fund and election for authorization to impose. The trustees of any district may propose to adopt a general fund budget in excess of the general fund budget amount for such district as established by the schedule in section 75-6905 for any of the following purposes:

(1) building, altering, repairing or enlarging any schoolhouse of the district;

(2) furnishing additional school facilities for the district;

(3) acquisition of land for the district;

(4) proper maintenance and operation of the school programs of the district.

However, the trustees may not adopt a total general fund budget which exceeds one hundred seven percent (107%) of the general fund budget for the preceding year, unless such budget is adopted under conditions as provided in sections 75-6723 through 75-6730, or under the following conditions:

(a) new programs which are approved under 75-6903 or

existing programs which are expanded as a result of ANB increases approved under 75-6903;

(b) federal programs which are continued with local funds if federal funds are withdrawn or withheld.

In subsection (2)(a), above, the budget may exceed 107% of the preceding year's budget by a dollar amount equal to the increase in the maximum budget without a vote resulting from the introduction of the new or expanded program and in subsection (2(b) (sic), above, by a dollar amount not to exceed the amount received from federal sources for the preceding year. Nothing in this act shall prevent a school district from adopting a budget at least as large as the maximum budget without a vote as provided in section 75-6905.

When the trustees of any district determine that an additional amount of financing is required for the general fund budget that is in excess of the statutory schedule amount, the trustees shall submit the proposition of an additional levy to raise such excess amount of general fund financing to the electors who are qualified, under section 75-6410, to vote upon such proposition. Such special election shall be called and conducted in the manner prescribed by this Title for school elections. The ballot for such election shall state the amount of money to be raised by additional property taxation, the approximate number of mills required to raise such money, and the purpose for which such money will be expended, and it shall be in the following format:

PROPOSITION

Shall a levy be made in addition to the levies authorized by law in such number of mills as may be necessary to raise the sum of (state the amount to be raised by additional tax levy), and being approximately (give number) mills, for the purpose of (insert the purpose for which the additional tax levy is made)?

☐ FOR the additional levy.

☐ AGAINST the additional levy.

If the election on any additional levy for the general fund is approved by a majority vote of those electors voting at such election, the proposition shall carry and the trustees may use any portion or all of the authorized amount in adopting the preliminary general fund budget. The trustees shall certify the additional levy amount authorized by such a special election on the budget form that is submitted to the county superintendent and the county commissioners shall levy such number of mills on the taxable value of all taxable property within the district as prescribed in section 75-6926 as are required to raise the amount of such additional levy.

Authorization to levy an additional tax under the provisions of this section shall be effective for only one school fiscal year and shall be authorized by a special election conducted before the first day of August of the school fiscal year for which it is effective. Only one such additional levy for the maintenance and operation of the school programs of a high school district may be imposed by a high school district in a given school fiscal year."

APPENDIX B

No. 12651

IN THE SUPREME COURT OF THE STATE OF MONTANA

STATE EX REL. ROBERT L. WOODAHL, Attorney General of the State of Montana, and the MONTANA DEPARTMENT OF REVENUE,

Relators,

-vs-

HERBERT F. STRAUB, JAKE H. EHRET, KENNETH RUSTAD, as County Commissioners for Fallon County, Montana, and SILVER

ROTH, as County Treasurer of Fallon County, Montana,

Respondents.

PETITION FOR REHEARING

Respondents hereby respectfully petition the Court for a rehearing in the above cause on the grounds and for the reasons hereinafter set forth.

CONSIDERATION OF THIS PETITION BY THE COURT IS NECESSARY FOR A COMPLETE DETERMINATION OF THE ISSUES, IRRESPECTIVE OF WHETHER SUCH A PETITION IS PERMITTED BY THE RULES OF APPELLATE PROCEDURE

In its opinion in the above cause entered on February 6, 1974, the Court declared and adjudged that Chapter 355 of the Montana Laws of 1973 was constitutional on its face, and further ordered the respondents forthwith to remit to the state treasurer the funds collected by them and required by said Chapter to be so remitted. In so doing, the Court appears to have resolved all issues in favor of relators, thus foreclosing further action with respect to the taxes collected by Fallon County under Chapter 355.

While we contended otherwise in the main action, we do not seek by this petition to reargue the question whether Chapter 355 is constitutional on its face, or whether this Court should make such a determination in this proceeding. We appear to be precluded from doing so under Rule 34 of the Rules of Appellate Civil Procedure providing in part as follows:

> "When, in appeals or special proceedings, it is ordered that remittitur, peremptory writ or judgment issued forthwith, no petition for rehearing will be entertained."

It is essential for us, however, to petition this Court for reconsideration of that portion of its opinion which requires

immediate payment of the funds in dispute, so that the Court will be apprised of our assertion that this action is a procedural violation of the due process clause of the United States Constitution, and discriminates against the taxpayers, residents and school systems of Fallon County. In our view, the Court should reconsider this aspect of its decision, so as to afford to the respondents an opportunity to present evidence in a proper tribunal of the facts on the issues which this Court has acknowledged, and which may prove that the statute, while constitutional on its face, is unconstitutional in its application to the respondents and the Fallon County taxpayers whose funds are the subject of this action.

IN REQUIRING PAYMENT OF THE FUNDS WITHOUT AFFORDING TO RESPONDENTS AN OPPORTUNITY TO PRESENT THEIR EVIDENCE, THE COURT HAS DENIED TO THE RESPONDENTS DUE PROCESS OF LAW, IN VIOLATION OF THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE II, SECTION 17 OF THE MONTANA CONSTITUTION

The action is based, among other things, upon this essential allegation of relators' complaint:

> "16
>
> Only legal questions regarding the validity and constitutionality of Chapter 355 exist in this case. There are no material factual controversies to be determined, and relators have no plain, speedy or adequate remedy available in the ordinary course of law other than this original declaratory judgment action."

This allegation was specifically denied by the respondents (paragraph 1, Answer of Respondents), and respondents affirmatively placed in issue the factual questions by defenses con-

tained in their answer, as follows:

"

VI.

Insofar as Chapter 355 affects the taxpayers of Fallon County, Montana, it fails to define, set forth or establish any reasonable standard or relationship to justify the local property taxation of Fallon County residents for the sole purpose of supporting schools outside of Fallon County, or to justify such taxation as a substitute for state funding. In these respects the Act is an attempted abuse of the power to tax and is in violation of the due process clause of the Constitution of the State of Montana (Article II, Section 17) and of the 14th Amendment to the Constitution of the United States.

VII.

The respondents are informed and believe that Chapter 355 is unconstitutional on its face, and that its provisions are invalid under any construction or application of said law. However, they are further informed and believe that there are factual issues between the relators and the respondents, which, when resolved, will demonstrate to an even greater degree the invalidity of said Chapter 355, and for that reason the Court should not accept original jurisdiction of the controversy."

It is obvious from these allegations, and from the briefs and oral arguments at the hearing, that all parties to this action were aware of and had accepted the circumstances under which this Court would entertain original jurisdiction of this type of action. In the original brief filed by the relators reference was made to the very recent case of Woodahl v. Montana Board of Natural Resources, 516 P.2d 383, setting forth the following prerequisites to the acceptance of original jurisdiction in a declaratory judgment action:

(1) That an emergency situation exists

(2) That only legal questions without material factual controversies exist

(3) That ordinary legal procedures will not afford timely relief

These were the accepted ground rules which controlled the pleadings, briefs and argument of the case from its inception, and by which all parties considered themselves to be confined. There was never any doubt about the position of the relators that no material facts were in dispute, the denial of that contention by the respondents and intervenors, and the desire of respondents to introduce such facts in an appropriate proceeding for the purpose of showing that Chapter 355 is unconstitutional in its application to the facts of this case.

If respondents were permitted to do so, they would introduce evidence to show that Chapter 355 provides for inequitable distribution of funds in violation of the Montana and U.S. Constitutions; that school systems in Fallon County have budgeted to the maximums permitted by law; that the "permissive" levies which they are required under Chapter 355 to remit to the state treasurer are needed for the support of their own school systems and would be so utilized if they were not precluded from doing so under the seven per cent provision in Chapter 355; and that the law makes it impossible for Fallon County to provide for its school children a basic system of education comparable in quality to the school systems in other counties which are recipients of Fallon County tax funds. In our view the opinion of this Court recognizes the existence of these factual issues, but denies to respondents the opportunity to present evidence in support of these contentions.

A strikingly similar situation was presented in the case of Saunders v. Shaw, 244 U.S. 317 (1917). The plaintiff in that case brought action to enjoin the collection of a drainage tax, on the ground that his property would receive no benefit from the system. The supreme court of Louisiana initially affirmed a judgment for the defendant, but thereafter granted a rehearing

and reversed its position. The effect of this was to deny to the defendant an opportunity to introduce evidence in support of his position. The United States Supreme Court held that this action by the appellate court constituted a denial of due process of law contrary to the 14th Amendment. We quote from the opinion of Mr. Justice Holmes:

> "The intervening defendant thereupon applied for a rehearing, but the court declined to consider the application under its rule that only one rehearing should be granted. He now brings this writ of error and says that he has been deprived of due process of law contrary to the Fourteenth Amendment, because the case has been decided against him without his ever having had the proper opportunity to present his evidence. Technically this is true, for when the trial court ruled that it was not open to the plaintiff to show that his land was not benefited, the defendant was not bound to go on and offer evidence that he contended was inadmissible, in order to rebut the testimony already ruled to be inadmissible in accordance with his view. The Chief Justice and Mr. Justice O'Neill were of opinion that the case should be remanded to the trial court, we presume upon the ground just stated. Probably the majority of the Supreme Court thought that it was so plain on the uncontroverted facts that the case was within the principle of *The Myles Salt Company's Case* that to remand it would be an empty form - a mere concession to technicality. It may turn out so, but we do not see in the record an absolute warrant for the assumption and therefore cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in."

The Court then observed that the appellant was entitled to

raise this federal question in the Supreme Court because he had called the matter to the attention of the state supreme court as soon as practicable after the action had been taken. The Court said:

> "The question remains whether the writ of error can be maintained. The record discloses the facts but does not disclose the claim of right under the Fourteenth Amendment until the assignment of errors filed the day before the Chief Justice of the State granted this writ. Of course ordinarily that would not be enough. But when the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. The defendant was not bound to contemplate a decision of the case before his evidence was heard and therefore was not bound to ask a ruling or to take other precautions in advance. The denial of rights given by the Fourteenth Amendment need not be by legislation. *Home Telephone & Telegraph Co. v. Los Angeles*, 227 U.S. 278. It appears that shortly after the Supreme Court had declined to entertain the petition for rehearing the plaintiff in error brought the claim of constitutional right to the attention of the Chief Justice of the State by his assignment of errors. We do not see what more he could have done."

The Saunders case has been cited many times, and is recognized as the landmark case on the proposition that the failure by a court to receive evidence on a material issue in a civil action amounts to a denial of due process. See, for example, Western and Atlantic R. Co. v. Henderson, 279 U.S. 639 (1929);

Mullane v. Central Hanover Trust Company, 339 U.S. 306 (1950); Ohio Bell Telephone Company v. Public Utilities Commission, 301 U.S. 292, 303 (1936); Armstrong v. Manzo, 380 U.S. 545 (1964). The last cited case involved an adoption hearing under which the appellant was required by law to overcome an evidentiary burden. He was placed in that position by virtue of a decree entered without notice to him. The Court held that the enforcement of these rules of evidence constituted a denial of due process, stating:

> "A fundamental requirement of due process is the opportunity to be heard. Grannis v. Ordean, 234, U.S. 385, 394. It is an opportunity which must be granted at a meaningful time and in a meaningful manner."

In Sandoval v. Rattikin, 385 U.S. 901 (1966), Mr. Justice Fortas dissented from the denial of a writ of certiorari, citing the Saunders case and stating in his opinion:

> "State courts in civil actions must afford to each litigant a proper opportunity to present his evidence."

In Georgia R. & E. Co. v. Decatur, 295 U.S. 165, 171, the U. S. Supreme Court cited the Saunders case and held that the refusal of a court to receive or consider any proof whatever on a material subject amounts to a denial of a hearing on that issue, in contravention of the due process clause.

We believe these decisions are pertinent and controlling on this point, and that the Court should grant a rehearing for that reason.

THE OPINION OPERATES TO DISCRIMINATE AGAINST THE RESPONDENTS, BECAUSE THEIR OBLIGATION TO REMIT THE FUNDS IS DETERMINED WITHOUT A HEARING, WHILE THE FUNDS HELD BY OTHER COUNTY TREASURERS ARE NOT AFFECTED

We contend that the respondents are denied equal protection, also in violation of the 14th Amendment, in that the Court has made disposition of the tax funds held by them while at the same time leaving open the question of funds held by other county treasurers, pending resolution of the factual issues involved. In our view the funds were collected and held by the Fallon County Treasurer in trust for the taxpayers, if the law is unconstitutional in its application. If the opinion constitutes a final judgment with respect to the disposition of the funds, respondents and the persons whom they represent are deprived of a remedy which is available to the citizens of the other paying counties.

Respondents reassert in this petition, without argument, each of the issues and contentions raised in their answer and memorandum filed in the above cause. We submit that a rehearing should also be granted on these aspects of the case.

Respectfully submitted,

DENZIL R. YOUNG
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Baker, Montana 59313

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Helena, Montana 59601

By: A. W. Scribner

Attorneys for Respondents

(Certificate of service omitted in printing)

Filed: February 15, 1974

APPENDIX C

No. 12651

IN THE SUPREME COURT OF THE STATE OF MONTANA

1974

(Title omitted in printing)

ORIGINAL PROCEEDING:

Counsel of Record:

For Relators:

Hon. Robert L. Woodahl, Attorney General, Helena, Montana
Dennis Lind argued, Assistant Attorney General, Helena, Montana
George Losleban, Assistant Attorney General, appeared, Helena, Montana
R. Bruce McGinnis argued, Helena, Montana

For Respondents:

A. W. Scribner argued, Helena, Montana
Denzil Young argued, Baker, Montana
Sandall, Moses and Cavan, Billings, Montana
Charles F. Moses argued and Ralph S. Wright argued, Billings, Montana

For Intervenors:

Robert Brooks, County Attorney, argued, Broadus, Montana
Carroll Blend argued, Helena, Montana

For Amici Curiae:

Richard J. Conklin, County Attorney, argued, White Sulphur Springs, Montana
Ralph Herriott, County Attorney, argued, Hysham, Montana

Submitted: January 14, 1974
Decided: February 6, 1974

Mr. Justice Wesley Castles delivered the Opinion of the Court.

This is an original proceeding brought by the Attorney General and the Montana Department of Revenue. The petition requested assumption of jurisdiction by this Court of a complaint which seeks a declaratory judgment under Title 93, Chapter 89, Revised Codes of Montana, 1947. The named defendants are the county commissioners and the county treasurer of Fallon County. On ex parte presentation the Court accepted jurisdiction; allowed the filing of the complaint; and provided for service upon the Superintendent of Public Instruction and the Clerk and Recorder of each county as the clerk of the Board of County Commissioners of each county. The Court invited participation of those interested in the outcome of this proceeding.

The essential allegations of the complaint filed by the plaintiffs are:

1. Art. X, Montana Constitution, 1972, requires the legislature to provide a system of schools.

2. Chapter 355, Laws of Montana, 1973, amends Chapter 69 of Title 75, Revised Codes of Montana, by providing a new taxing system in part for the support of public schools.

3. The tax system contained in Chapter 355 requires each county to levy a basic 40 mill tax [for both primary and secondary schools] on property in the county and if the funds raised by this tax exceed the amount needed to fund the "foundation program" in that county the excess is to be remitted to the state for deposit in the "earmarked revenue fund, state equalization aid account".

4. This surplus is to be used in combination with other funds deposited in the account to fully fund the "foundation program" in those counties not fully funded by the basic levy.

5. Chapter 355 authorizes the adoption of budgets in excess of the minimum required by the foundation program and provides that if this budget cannot be fully funded by the imposition of specified additional county levies the director of the Montana Department of Revenue is to impose a statewide property tax at such a millage as will result in full funding of these deficiencies in the various school districts.

6. On August 6, 1973 in accordance with this authorization, the Department of Revenue ordered all counties to impose an additional mill levy of 12 mills.

7. On August 16, 1973, an action was commenced in Powder River County seeking to have Chapter 355 declared void.

8. In October 1973, defendant Fallon County Commissioners directed defendant Fallon County Treasurer to hold all monies collected under authority of Chapter 355 until such time as the constitutionality of that chapter was determined by the courts.

9. Pursuant to this direction the Fallon County Treasurer has refused to pay over the monies, thus creating an actual controversy.

10. This is an emergency situation since the first payment of these monies was scheduled for January 31, 1974, and normal process of law will not provide for speedy determination.

11. That only questions of law are involved.

12. That other counties have now begun to impound funds collected under authority of the Act, further aggravating the situation.

In this Court's order accepting jurisdiction, the matter pending in Powder River County was stayed.

Fallon County appeared by answer, which we shall discuss further. Powder River County, Chouteau County, Toole County,

Meagher County and the Superintendent of Public Instruction appeared in various ways -- intervention, amicus curiae and otherwise. This Court has been liberal in considering all matters but, as will appear hereinafter, the procedural problems and certain other policy and substantive problems alluded to in various ways by brief, motion and otherwise will not need be considered herein.

Fallon County's answer to the complaint denies all of the legal conclusions of the complaint and then sets up these affirmative defenses:

a) That Chapter 355 will require Fallon County to remit substantial sums to the state for the support of school districts located in other counties.

b) That over all Chapter 355 will require 39 counties to remit taxes which be distributed to 17 counties.

c) That Chapter 355 violates Art. X, Sec. 1, Montana Constitution 1972, which requires the legislature to fully fund the school system.

d) That Chapter 355 represents an unlawful delegation of legislative authority.

e) That the tax levied discriminates against the taxpayers of Fallon County by requiring them to pay more than is required for the support of its local schools violating both Article XIII, Sec. 1, Montana Constitution 1972, and the Fourteenth Amendment to the United States Constitution.

f) That Chapter 355 fails to set forth any reasonable standard justifying property taxation in Fallon County for support of schools in other counties.

g) That factual issues exist which require this Court to decline jurisdiction.

Even though, as respondents point out, factual issues do exist this is no bar to a consideration of the validity of Chapter

355 on its face.

Plaintiffs in the Powder River County suit raise by intervention a preliminary issue in this action. Essentially intervenors assert that prior to July 1, 1973, the legislature was operating under the authority of the 1889 Montana Constitution and accordingly its acts, to be valid, must conform to the limitations contained therein even though the acts are not to take effect until after the date the new Constitution replaces the old.

While this Court has not heretofore considered this question, we have no hesitation in rejecting intervenors' proposition. While it is true that a statute, unconstitutional when it takes effect, is not resurrected by a subsequent constitutional change, State ex rel. Woodahl v. District Court, ____Mont.____, 511 P.2d 318, 30 St. Rep. 635, the instant situation differs in that the statute was passed in anticipation of an already approved constitutional change and was of no force or effect until after the new Constitution took effect.

The Georgia Supreme Court in Henson v. Georgia Industrial Realty Co., 220 Ga. 857, 142 S.E.2d 219, 223, 224, observed:

> "It is the general rule in this country that a legislature has power to enact a statute not authorized by the existing constitution of that State when the statute is passed in anticipation of an amendment to its constitution authorizing it * * *."

The rule is based on the theory that the constitutionality of the statute is to be tested at the time the statute takes effect and not at the time of passage. Neisel v. Moran, 80 Fla. 170, 85 S. 346; State v. Hecker, 109 Or. 520, 221 P. 808; Alabam's Freight Co. v. Hunt, 29 Ariz. 419, 242 P. 658. We agree with this view and hold that the test of a statute's constitutionality is to be made at the time it takes effect and is

to be made against the constitution as it exists at the time the statute takes effect, not at the time the statute was passed by the legislature. See: Druggan v. Anderson, 269 U.S. 36, 46 S.Ct. 14, 70 L ed 151; In re Opinions of the Justices, 227 Ala. 291, 149 S. 776; State v. Smith, 335 Mo. 840, 74 S.W.2d 27; Busch v. Turner, 26 Cal.2d 817, 161 P.2d 456; Galveston Ry. Co. v. Gross, 47 Tex. 428. All of these cases approved statutes passed by the legislature in anticipation of constitutional change.

Holding that the 1973 legislature could enact prospective or anticipatory legislation to become effective July 1, 1973, under the terms of the Montana Constitution 1972, we consider the constitutionality of Chapter 355 under the Montana Constitution 1972.

Respondents' memorandum of authorities considers the issues raised by its answer under three general headings:

(1) Chapter 355 violates Article X, Sec. 1 of the Montana Constitution 1972.

(2) Chapter 355 discriminates against the taxpayers of Fallon County by attempting to tax them for the exclusive use and benefit of others.

(3) That factual issues exist which would justify this Court in declining to accept jurisdiction.

Because of the view the Court takes in this case, these issues can best be considered against the background of a general consideration of the state's power to levy a general property tax for educational purposes.

It is clear that the taxes imposed by Chapter 355 are state rather than local taxes. Provision is made in Chapter 355 for three distinct levies. First is the basic 40 mill levy for support of the foundation program. The language of that levy is mandatory "It shall be the duty of the county commissioners of each county to levy", with the clear effect that all property within the state is levied on at the rate of 40 mills for the

support of the foundation program. The other two levies -- the additional levy for deficiency in foundation program funding and the permissive levy -- are even more clear in their uniform statewide applicability, with the director of the Department of Revenue ordered to impose the levies on all the property in the state. It is clear that a tax imposed by state law and levied uniformly on all property within a state is a state rather than a local tax.

Once it is established that Chapter 355 is a state rather than a local tax, there remains the question of the state's power to levy a statewide property tax with the avowed purpose of providing support for education. Here, it should be recalled that a state constitution, such as Montana's is a document of limitation rather than of grant and accordingly a statute must contravene some express or implied limitation of that constitution to be invalid. Evers v. Hudson, 36 Mont. 135, 92 P. 462; State ex rel. Peyton v. Cunningham, 39 Mont. 197, 103 P. 497; Billings Sugar Co. v. Fish, 40 Mont. 256, 106 P. 565; Northern Pac. Ry. v. Mjelde, 48 Mont. 287, 137 P. 386; State v. Dodd, 51 Mont. 100, 149 P. 481; State ex rel. Corry v. Cooney, 70 Mont. 355, 225 P. 1007; Butte & Superior Min. Co. v. McIntyre, 71 Mont. 254, 229 P. 730; Graham v. State Board of Examiners, 116 Mont. 584, 155 P.2d 956; Mulholland v. Ayers, 109 Mont. 558, 99 P.2d 234; Plath v. Hi-Ball Contractors, Inc., 139 Mont. 263, 362 P.2d 1021.

Aside from the provisions of the United States Constitution, the only limitation on the state's power to tax applicable here is Art. VIII, Sec. 1, Montana Constitution 1972, which provides: "Taxes shall be levied by general laws for public purposes." Since Chapter 355 requires all property be levied on at the same rate, it is clearly a general law. State ex rel. Federal Land Bank v. Hays, 86 Mont. 58, 282 P. 32; Stanley v. Jeffries, 86 Mont. 114, 284 P. 134. Similarly, given the express declaration of Art. X, Sec. 1, Montana Constitution 1972, that the development of a quality system of education is a state goal, there can be no dispute with the proposition that a

tax for the support of education is levied for a public purpose. Thus it follows that Chapter 355 is not violative of any constitutional provisions and is a constitutionally valid exercise of the state's power to tax.

Against this background the issues raised by respondents may be settled. The first issue that Chapter 355 violates Art. X, Sec. 1, Montana Constitution 1972, is premised on the requirement contained therein that the legislature provide full funding of the basic educational system. It is respondents' position that Art. X, Sec. 1(3), requires the legislature fund its share of the cost of education solely from the traditional sources of foundation program funding -- oil and gas royalties, income taxes, and corporation license taxes or other traditional general fund sources. This view is not correct. The only mandate contained in Art. X, Sec. 1(3), Montana Constitution 1972, is that the legislature fully fund the state's share of the cost of basic education. It is silent as to the means the legislature may employ for this purpose. By enacting Chapter 355, the legislature elected to employ a statewide property tax. While the wisdom of that legislative choice may be questioned, its constitutional validity may not. That other sources of revenue may be available, such as severance, excise and sales taxes as suggested, is true. But, the legislature has chosen property taxes to the dismay of many property owners. As our foregoing discussion indicates, the legislature could adopt a property tax and having done so it is free to use the proceeds realized by the tax for any public purpose, including fulfillment of the duty to fund public education.

Respondents' second issue is that Chapter 355 discriminates against the taxpayers of Fallon County. There are two facets to this issue. The first is predicated on the claim that the property tax levied by Chapter 355 on that particular part of all property in the state which is situate in Fallon County will produce funds in excess of those required by that particular part of the public school system located in Fallon County. It is asserted that those provisions of Chapter 355 which require

the excess funds be remitted to the state result in a taking of property without due process.

Reduced to its simplest terms, respondents' position is that revenue raised by a state tax must be expended in the county in which that revenue originates. Respondents reach this conclusion by first denominating the tax levied by Chapter 355 as a "local property tax" and then applying the generally accepted rule that one district cannot be subjected to tax for the benefit of another district.

As our preceding discussion points out, the tax levied by Chapter 355 is a state tax levied for the benefit of the state as a whole. Viewed in that light the tax does not offend against the rule relied upon by respondents since the taxing district, the state, benefits as a whole from the tax imposed.

That some areas derive more immediate and direct benefits from the tax is not an objection, if the community as a whole benefits. State ex rel. Henderson v. Dawson County, 87 Mont. 122, 137, 286 P. 125. In Kelly v. City of Pittsburgh, 104 U.S. 78, 82, 26 L ed 658, a landowner challenged a tax on the same grounds relied on by respondents here, that because he did not receive a direct personal benefit from a tax it amounted to a taking of property without due process. In rejecting this claim the United States Supreme Court said:

> "It may be true that he does not receive the same amount of benefit from some or any of these taxes as do citizens living in the heart of the city. It probably is true * * * that his tax bears a very unjust relation to the benefits received as compared with its amount. But who can adjust with precise accuracy the amount which each individual in an organized civil community shall contribute to sustain it, or can insure in this respect absolute equality of burdens, and fairness in their distribution among those who must bear them?

" * * *

"Clearly, however, these are matters of detail within the discretion, and therefore the power, of the law-making body within whose jurisdiction the parties live. This court cannot say in such cases, however great the hardship or unequal the burden, that the tax collected for such purposes is taking the property of the taxpayer without due process of law."

This general rule is summarized in Cooley on Taxation, V. 1, 4th Ed., Sec. 89, P. 214:

" * * * However, it is almost unanimously held that it is no defense to the collection of a tax for a special purpose that a person liable for the tax is not benefited by the expenditure of the proceeds of the tax or not as much benefited as others. * * * In other words, a general tax cannot be dissected to show that, as to certain constituent parts, the taxpayer receives no benefits."

This is the rule we hold applicable to the tax questioned in the instant case. It is a general tax levied at the same rate on all property in the state. It is for the general state purpose of providing a statewide system of public schools. The fact Fallon County does not receive benefits directly in the amount of its contribution does not provide a defense to the collection of the taxes authorized by Chapter 355.

This same conclusion has been reached by the courts of other states when called upon to determine the validity of a uniform property tax whose proceeds are distributed on a pro-rata basis to schools, even though there, as here, the amount contributed by an area in taxes exceeded in some instances the amount returned to the area for its schools. Sawyer v. Gilmore, 109 Me. 169, 83 A. 673; Raynolds v. Swope, 28 N.M. 141, 207

P. 581; Miller v. Korns, 107 Ohio St. 287, 140 N.E. 773; Board of Trustees, Etc. v. Board of County Com'rs, 83 Ida. 172, 359 P.2d 635. Some state courts have gone even further and held that uniform state taxation for school support is constitutionally required. Serrano v. Priest, 96 Cal. Rptr. 601, 487 P.2d 1241; Sweetwater Co. Plan. Com. v. Hinkle, (Wyo. 1971) 491 P.2d 1234, 1237.

The authority relied on by respondents to support the contention that Chapter 355 is invalid as a tax levied on one district for the benefit of another is not in point. The Wyoming case of Tennant v. Sinclair Oil and Gas. Co. (Wyo. 1960) 355 P.2d 887, dealt with a tax which was levied only on specified school districts as opposed to the uniform levy of Chapter 355, and which arbitrarily awarded a part of the fund created by the tax to the other school districts which were not subject to the tax, as opposed to the provisions of Chapter 355 which specify that each district is to receive its share in total proceeds on a modified prorata basis. Our conclusion that this decision does not apply to tax such as that levied by Chapter 355, is reinforced by the subsequent decision of the Wyoming Court in Sweetwater in which it observed that equalization of taxes for school purposes is constitutionally required in that state. It then went on to state:

> "We see no manner in which ad valorem taxes for school purposes can be made equal and uniform unless it is done on a state-wide basis. In other words, all property owners within the state should be required to pay the same total mill levy for school purposes."

This is precisely what has been done by Chapter 355, each property owner now pays the same basic mill levy for school purposes. Similarly, the Nebraska case cited by respondents, Peterson v. Hancock, 155 Neb. 801, 54 N.W.2d 85, can be distinguished on the grounds that while the tax was levied uniformly, certain school districts were arbitrarily denied a right

to share on any basis in the proceeds. Under Chapter 355 all school districts and all counties share in proportion to their need.

The second facet of respondents' claim that Chapter 355 results in discrimination against the taxpayers of Fallon County relates to the manner in which the funds raised by Chapter 355 are distributed. Respondents assert that various facts would reveal that some school districts are unable to provide educational offerings comparable to those which are provided in other districts. For example, respondents maintained that a comparison of curricula would demonstrate a wide disparity in the educational opportunities offered by different schools. No doubt this is true. No doubt other comparisons could be made which would show differences in educational opportunity. Respondents assert that these comparisons would conclusively demonstrate the foundation program itself is ill conceived in that it does not take into consideration to a sufficient degree the differences in schools resulting from differences in the number of pupils. It is argued that the foundation program of X dollars per pupil is itself arbitrary and lacking in uniformity. Further, that the 7% limitation on increases in school budgets has effectively locked those schools with substandard programs into a position of permanent inequality of educational opportunity.

In this case, no assertions of substandard programs are made. The foundation program provides for accreditation and other standards. We do not here rule on the validity of the 7% limitation on budgets as provided in Chapter 355. Without the facts of a specific situation before us, we can only consider the constitutionality of the foundation program and the budget limitations of Chapter 355 on their face and not as applied. Certainly any reasonable person would grant that there are imperfections in the foundation formula, with its many viables. The constitutional test is not perfection, but rather whether when taken as a whole it is a rational method to accomplish the goal of equal educational opportunity for each person of the state. As the United States Supreme Court observed in San Antonio

School District v. Rodriguez, 411 U.S. 1, 93 S.Ct.____, 36 L ed 2d 16, 48:

> "The very complexity of the problems of financing and managing a statewide public school system suggest that 'there will be more than one constitutionally permissible method of solving them,' and that, within the limits of rationality, 'the legislature's efforts to tackle the problems' should be entitled to respect. Jefferson v. Hackney, 406 U.S. 535, 546-547, 32 L ed 2d 285, 92 S.Ct. 1724 (1972)."

An on the face examination of the provisions of the foundation program dealing with the distribution of state educational funds reveals that such funds are distributed basically on a per student basis with the smaller schools receiving somewhat more per student than the larger schools. Provision is made for budget increases resulting from an increase in enrollment. Further, the trustees are empowered to increase the local budget through additional levies, if approved by the district's electors. It is difficult to visualize a method other than some system of cash grants through which the state could meet its constitutional obligation under Art. X, Sec. 1, Montana Constitution 1972, to provide for and fund a basic educational system while leaving the actual supervision and control of each school district in a board of trustees as required by Art. X, Sec. 8, Montana Constitution 1972. Accordingly, while not foreclosing a consideration of the foundation program and the budget limitations of Chapter 355 as applied, we hold that on its face the program is a rational method of providing the required basic public education.

Because of the view we have taken of the other issues in the case, it is clear that the factual questions alluded to in the final issue raised by respondents, while real, are not relevant. We will not consider that issue further.

This opinion constitutes a judgment that Chapter 355 is

constitutionally valid on its face. Therefore, defendant Silver Roth, County Treasurer of Fallon County, is ordered to remit forthwith to the state those monies collected under authority of Chapter 355. Each party to bear its own costs of this proceeding.

/s/ Wesley Castles
Justice

We concur:

/s/ James T. Harrison
Chief Justice

/s/ Frank I. Haswell

/s/ Gene B. Daly

/s/ John Conway Harrison
Justices

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 12651

(Title omitted in printing)

ORDER

PER CURIAM:

IT IS ORDERED that the petition for rehearing in the above-captioned cause is hereby denied.

DATED this 24th day of April, 1974.

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No. 73-2049

In The

Supreme Court of the United States

October Term, 1974

HERBERT F. STRAUB, JAKE H. EHRET, and KENNETH RUSTAD, as County Commissioners for Fallon County, Montana, and SILVER ROTH, as County Treasurer of Fallon County, Montana, *Petitioners,*

-vs-

ROBERT L. WOODAHL, Attorney General of the State of Montana, and the MONTANA DEPT. OF REVENUE, *Respondents.*

Respondents' Brief in Opposition

TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioners statement of the case is satisfactory.

REASONS FOR DENYING THE WRIT

The due process guarantees of the 14th Amendment to the Constitution of the United States extend to all citizens of the United States. The party claiming a violation of the guaranty of due process of law must show that some personal or property right belonging to him has been infringed upon. Where a state agency is concerned there is no scope for invoking the due process guaranty as against the action of the state itself. This action began as a suit for a declaratory judgment in the Supreme Court of Montana, seeking to compel the County Commissioners and County Treasurer of Fallon County to collect certain monies as a tax designated to provide funding for public schools. The same tax was in effect in all of Montana's counties and at the same tax rate. In the case of such a tax it is the duty of such county officials to carry out the intentions of the legislature in enacting the tax. Those county officials are, in their official capacity, officers of the state. In *Coleman v. Miller*, 307 U.S. 433 (1938), review was denied on grounds other than standing. However, in a separate opinion on the standing issue, concurred in by Justices Black, Roberts and Douglas, Mr. Justice Frankfurter stated:

> ". . . an official has a legally recognized duty to enforce a statute which he is charged with enforcing. . . . We can only adjudicate an issue as to which there is a claimant before us who has a special, individualized stake in it. One who is merely the self-constituted spokesman of a constitutional point of view cannot ask us to pass on it." p. 466.

In an earlier case a state official sued a railroad in state court to collect a tax which had been reduced by an amendatory law relied on by the railroad. The official attacked the amendment on the ground that the bill had not been published as required by the state constitution. On appeal

to the Supreme Court of the United States, the court responded to that issue by stating that:

> ". . . the protection of the 14th amendment against state action is only for the benefit of those who are injured through the invasions of personal or property rights or through the discriminations which the amendment forbids. The constitutional guaranty does not extend to the mere interest of an official, as such, who has not been deprived of his property without due process of law." *Columbus & Ohio R.R. Co. v. Miller*, 283 U.S. 96, 100 (1930).

Of course, in this case it was not the county officials who brought the suit for declaratory judgment in the Supreme Court of Montana. However, it was their refusal to fulfill their obligations as county officials which forced the state to bring the original proceeding against them. They should not benefit from their own refusal to fulfill their duties by being heard to object on the grounds that their guaranty of due process has been violated.

No constitutional guaranty has been violated in this case. As county officials the petitioners have no personal or property right which can be violated. Only the taxpayers affected by the tax in question may be heard to complain of some personal or property right being violated and those taxpayers are not nor have they been before the court. Even in the case of a taxpayers' suit, there is no presumption of standing, rather in those cases, standing is normally a function of the substantiality of the taxpayers' interest in the outcome. *Flast v. Cohen*, 392 U.S. 83 (1965).

In the original proceeding of this case in state court the central issue was whether the county officials of Fallon County should be compelled to collect the tax in question. In their application for writ of certiorari, petitioners claim not to have had the opportunity to present certain factual matters which they allege would prove the constitutional violations complained of. While it is true that no opportunity was had to present facts at trial, it is also

true that both sides were allowed substantial opportunity to take advantage of the doctrine of judicial notice. The state court took notice of all facts necessary for its decision. Since the suit was brought to compel county commissioners to collect the tax is was necessary to examine the tax itself in order to determine its terms, purpose, and its effect. It was further necessary to examine the provisions of the 1972 Constitution of the State of Montana under which the statute was given effect. In addition, it was noticed that the purpose of the statute, quality public education, was a valid and proper goal to be achieved through the power of taxation. Once it was determined that the goals and means used to achieve those goals were within the power of the legislature, and that the means were reasonably calculated to achieve those goals, no further examination was necessary under the circumstances. As the Montana Supreme Court stated in its opinion:

> "Because of the view we have taken on the other issues in the case, it is clear that the factual questions alluded to in the final issue raised by respondents, while real, are not relevant. We will not consider that issue further." *State ex rel. Woodahl v. Straub*, 31 St.Rptr. 138, 520 P.2d 776, 783 (1974).

It should be noted at this point that decisions of state courts enjoy the same status as legislative enactments in regard to their presumption of validity. In *Darr v. Burford*, 339 U.S. 200 (1949), the rule was stated on page 205:

> "It was not to be presumed that the decision of the state court would be otherwise than is required by the fundamental law of the land, or that it would disregard the settled principles of constitutional law announced by this court. . ."

In view of the parties involved, the statute can be challenged only on its face. No other facts are required in determining its constitutionality in that respect other than the power of the legislature to so legislate.

Applications to this court for writ of certiorari have traditionally been subjected to a rule so fundamental that

it requires no citation. This court will entertain such applications for writ only where the case involves some substantial new issue. The reason for this rule has been that since certiorari is an extraordinary writ to be granted where no right to appeal will lie and is to be used only where the issue has never before been decided. The question becomes one of fairness. Would it serve the ends of justice to grant the writ even though no legal right exists which requires that the case be given consideration by the highest court in the land? It is wholly within the discretion of the court whether or not to grant the writ which would allow review of the petitioners' case by the Supreme Court of the United States. It is the contention of the respondents in this case that no conditions or circumstances surround this case which require review. In *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1 (1973), this court decided issues so similar in nature to the issues presented by petitioners in this case that the matter can be decided on identical grounds.

In hearing this case for declaratory judgment, the Montana Supreme Court determined that it was not necessary to hear additional facts relating to particular amounts which individual taxpayers might be required to pay nor was it relevant that some inequality would persist in the new system of financing public education in Montana. It relied in substantial part on *Rodriguez*, supra, when it recognized that no system of financing public schools would or could remove all vestiges of inequality. The purpose of the new system is, however, to inject a new approach to school financing by equalizing the financial support given to each school district in order to eliminate the inherent inequalities which exist in publicly financed school systems as a result of the economic factors which are unique to each school district. It is not a function of the courts to determine what type of system will best achieve the goal of equality in the school system. If the court has determined that the method devised by the legislature is within the power of that body to legislate, that the purpose of the legislation is a valid purpose within constitutional limits,

and is reasonably calculated to achieve that purpose, then the court has met its obligation in reviewing the matter. In this case the Supreme Court of Montana has examined the legislation in question, codified as sections 75-6912, 75-6913, 75-6916, 75-6921, 75-6922 and 75-6923, Revised Codes of Montana, 1947, and the court has found it to meet the criteria set out above. As this court stated in *Rodriguez*, supra, at pp. 46, 47:

> ". . . a statute is not invalid because it might have gone further than it did, . . . a legislature need not strike at all evils at the same time, . . . The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized . . . . The passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies . . . ."

The opinion in *Rodriguez* also cited *Jefferson v. Hockney*, 406 U.S. 535 (1972), in which case the court, speaking directly to the problem of funding public schools, stated:

> "The very complexity of the problems of financing and managing a statewide public school system suggest that 'there will be more than one constitutionally permissible method of solving them', and that within the limits of rationality, 'the legislature's efforts to tackle the problems' should be entitled to respect." pp. 546, 547.

The present case is but one of a series of recent cases dealing with the financing of public schools. Two state courts have gone as far as holding that uniform state taxation for school support is constitutionally required. *Serrano v. Priest*, 96 Cal. Rptr. 601, 487 P.2d 1241 (1971); *Sweetwater Co. Plng. Comm. v. Hinkle*, ____ Wyo. ____, 491 P.2d 1234 (1971). Sections 75-6912, 75-6913, 75-6916, 75-6921, 75-6922 and 75-6923, R.C.M. 1947, were enacted for the general purpose of providing a statewide system of public schools with approximate equality of financial support. The means adopted by Montana to achieve that goal is a uniform statewide property tax, the proceeds of which

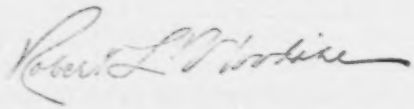
are distributed on a pro rata basis to schools. The results are dependent, of course, on the validity of the assumption that more money means better schools in those districts where the taxable value of property is low in relation to wealthier districts where it is assumed that the quality of education is commensurate with the greater amount of money generated by the higher taxable value of private property. It has been this assumption which has stood since the beginning of time as the basis for governmental policies and projects designed to improve the human condition. In the absence of clear evidence to the contrary, time has not changed the value of money in providing higher quality institutions such as public schools. Broad public policy requires that our public schools be of the highest attainable quality. It is in the interest of the entire State of Montana that its education system be one of high standards and not just in the interest of those persons residing in a particular school district.

The results of high quality education are not restricted to school district boundary lines, but extend beyond all borders in the bounty such an education produces for all citizens.

CONCLUSION

For the foregoing reasons the State of Montana respectfully requests the Court to deny petitioners' application for writ of certiorari.

Respectfully submitted,



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PROOF OF SERVICE

I, ROBERT L. WOODAHL, Attorney General of Montana, attorney for respondents Robert L. Woodahl, Attorney General of the State of Montana, and the Montana Department of Revenue, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 12th day of August, 1974, I served copies of the foregoing Respondents' Brief in Opposition to Petition for Writ of Certiorari on the petitioners in this action, pursuant to Rule 33, as follows:

To Petitioners Herbert F. Straub, Jake H. Ehret, and Kenneth Rustad, as County Commissioners for Fallon County, Montana, and Silver Roth, as County Treasurer of Fallon County, Montana, by mailing copies in a duly addressed envelope, with first-class postage prepaid, to the following addresses:

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SUPPLEMENTAL PROOF OF SERVICE

I, ROBERT L. WOODAHL, Attorney General of Montana, attorney for respondents Robert L. Woodahl, Attorney General of the State of Montana, and the Montana Department of Revenue, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 14th day of August, 1974, I served two copies of the foregoing Respondents' Brief in Opposition to Petition for Writ of Certiorari on each of the following parties in this action, pursuant to Rule 33, as follows:

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